(2)

Supreme Court, U.S.
FILED
NOV 30 2001
OFFICE OF THE CLERK

No. 01-746

IN THE

Supreme Court of the United States

BENJAMIN A. RATNER, a minor, by and through his mother and next friend, BETH HANEY, and BETH HANEY, individually,

Petitioners,

v.

LOUDOUN COUNTY PUBLIC SCHOOLS, EDGAR B. HATRICK, HARRY E. BIBB, JOSEPH L. MAUCK and ROBERTA A. GRIFFITH,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

Carol T. Stone
Counsel of Record
John O. Easton
Anna M. Stafford
JORDAN COYNE & SAVITS, L.L.P.
10486 Armstrong Street
Fairfax, Virginia 22030
Telephone (703) 246-0900
Counsel for Respondents

21 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Does the long-term suspension of a public school student who admitted possessing a knife on school property, and who received numerous notices of the charges against him and opportunities to tell his version of events, violate either the Due Process or Equal Protection Clause of the Fourteenth Amendment?

II. Did petitioners waive any claim under the Substantive Due Process Clause of the Fourteenth Amendment by not timely raising that argument below?

III. Did petitioners waive their contention that *Goss v. Lopez*, 419 U.S. 565 (1975), is not the correct standard for reviewing long-term suspensions by not timely raising that argument below?

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

REASONS FOR DENYING THE WRIT 1

1. The Fourth Circuit's decision is in accord with other federal and state courts which have considered the issues raised in the present appeal..... 1

2. Loudoun County School Board Policy § 8-32 is not a "zero tolerance" policy either on its face or as it was applied to Ratner..... 3

3. There was no violation of Ratner's right to substantive due process..... 5

4. There was no violation of Ratner's right to procedural due process..... 7

5. There was no violation of Ratner's right to equal protection..... 9

6. It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion..... 10

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Brian A. v. Stroudsburg Area Sch. Dist., 141 F. Supp. 2d 501 (M.D. Pa. 2001) 1

Bryan v. The City of Madison, Mississippi, 213 F.3d 267 (5th Cir. 2000) 9

Bundick v. Bay City Indep. Sch. Dist., 140 F. Supp. 2d 735 (S.D. Tex. 2001) 1, 6, 8, 10

Canton v. Harris, 489 U.S. 378 (1989) 6-7

Carden v. Arkoma Assoc., 494 U.S. 185 (1990) 6-7

Cathe A. v. Doddridge County Bd. of Educ., 200 W.Va. 521, 490 S.E.2d 340 (1997) 1

Clinton Municipal Separate Sch. Dist. v. Byrd, 477 So.2d 237 (Miss. 1985) 1

Craig v. Selma City Sch. Bd., 801 F. Supp. 585 (S.D. Ala. 1992) 7

District 28, United Mine Workers of America, Inc. v. Wellmore Coal Corp., 609 F.2d 1083 (4th Cir. 1979) 5

Escatel v. Atherton, No. 96 C 8589, 2001 U.S. Dist. LEXIS 9212 (N.D. Ill. June 29, 2001) 1, 6

Estate Const. Co. v. Miller & Smith Holding Co., Inc., 14 F.3d 213 (4th Cir. 1994) 5-6

FTC v. Grolier Inc., 462 U.S. 19 (1983) 6-7

Goss v. Lopez, 419 U.S. 565 (1975) 7-8

Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) 2

Hillman v. Elliot, 436 F. Supp. 812 (W.D. Va. 1977) 8

Hilton v. Wheeling, 209 F.3d 1005 (7th Cir. 2000), *cert. denied* 148 L. Ed. 2d 678 (2001) 9

James v. Unified Sch. Dist. No. 512, 899 F. Supp. 530 (D. Kan. 1995) 1, 8

J.M. v. Webster County Bd. of Educ., 207 W.Va. 496, 534 S.E.2d 50 (2000) 1

Jones v. Bd. of Governors of Univ. of North Carolina, 704 F.2d 713 (4th Cir. 1983) 8

Kolesnick v. Omaha Public Sch. Dist., 251 Neb. 575, 558 N.W.2d 807 (1997) 1, 6

Mathews v. Eldridge, 424 U.S. 319 (1976) 7

Mitchell v. Bd. of Trustees of Oxford Municipal Separate Sch. Dist., 625 F.2d 660 (5th Cir. 1980) 1, 10

Petrey v. Flaugher, 505 F. Supp. 1087 (E.D. Ky. 1981) 1

San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 6

Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000) 2-3

Sellers by Sellers v. School Bd. of C[illegible] of Manassas, Va., 141 F.3d 524 (4th Cir. 1998) 6

Shipp v. McMahon, 234 F.3d 907 (5th Cir. 2000) 10

Sylvia Development Corp. v. Calvert County, Md., 48 F.3d 810 (4th Cir. 1995) 9

Village of Willowbrook v. Olech, 528 U.S. 562 (2000) 9

Wood by and Through Wood v. Henry County Public Schools, 255 Va. 85, 495 S.E.2d 255 (1998) 1-3

Wood v. Strickland, 420 U.S. 308 (1975) 10

STATUTES

VA. CODE ANN. § 22.1-277.01 (Michie 2000) 2-3

VA. CODE ANN. § 22.1-277.07 (Michie 2001) 2

Loudoun County School Board Policy § 8-32 ..... *passim*

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment ..... *passim*

RULES OF COURT

Federal Rules of Civil Procedure, Rule12(b)(6) 1, 5

REASONS FOR DENYING THE WRIT

The Fourth Circuit affirmed the district court's dismissal of plaintiffs' complaint pursuant to Rule12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The decision below is correct. There is no conflict among the Circuits on this issue, and no occasion for further review.

1. The Fourth Circuit's decision is in accord with other federal and state courts which have considered the issues raised in the present appeal. *See, e.g., Mitchell v. Bd. of Trustees of Oxford Municipal Separate Sch. Dist.*, 625 F.2d 660 (5th Cir. 1980); *Bundick v. Bay City Indep. Sch. Dist.*, 140 F. Supp. 2d 735, 740 (S.D. Tex. 2001); *Brian A. v. Stroudsburg Area Sch. Dist.*, 141 F. Supp. 2d 501 (M.D. Pa. 2001); *Escatel v. Atherton*, No. 96 C 8589, 2001 U.S. Dist. LEXIS 9212 (N.D. Ill. June 29, 2001); *Petrey v. Flaugher*, 505 F. Supp. 1087 (E.D. Ky. 1981); *J.M. v. Webster County Bd. of Educ.*, 207 W.Va. 496, 534 S.E.2d 50 (2000) (citing *Cathe A. v. Doddridge County Bd. of Educ.*, 200 W.Va. 521, 490 S.E.2d 340 (1997)); *Wood by and Through Wood v. Henry County Public Schools*, 255 Va. 85, 495 S.E.2d 255 (1998); *Kolesnick v. Omaha Public Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997); *James v. Unified Sch. Dist. No. 512*, 899 F. Supp. 530 (D. Kan. 1995); *Clinton Municipal Separate Sch. Dist. v. Byrd*, 477 So.2d 237 (Miss. 1985). State and federal courts have held that mandatory school disciplinary policies are constitutional and that courts should not impose their judgment in place of the school officials'

merely because the court may believe that the punishment is harsh, unwise or unfair.[1]

The Petitioners' reliance on *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000), is misplaced.[2] In *Seal*, the Sixth Circuit held that a student might state a claim for a substantive due process violation if the student did not knowingly possess a weapon, *see id.* at 575-580, because "suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate state interest." *Id.* at 575. The issue in the *Seal* case was whether the student knowingly violated

---

[1] In fact, the Virginia statute on which the county school board's policy was based, *see* VA. CODE ANN. § 22.1-277.01 (Michie 2000), was specifically found constitutional by the Virginia Supreme Court. *See Wood by and Through Wood v. Henry County Public Schools*, 255 Va. 85, 495 S.E.2d 255 (1998). That statute has since been repealed and reenacted. *See* VA. CODE ANN.§ 22.1-277.07 (Michie 2001).

[2] Petitioners also argue that the present decision is at odds with the Fourth Circuit's previous opinion in *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980), but it is not. In *Tawney*, the Fourth Circuit considered whether a student could state a claim for a violation of substantive due process where the student was alleged to have been subjected to a severe beating by school officials. Comparing corporal punishment cases to police brutality cases, the Fourth Circuit said, "[T]he substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Id.* at 613. The decision was based on the student's right to personal privacy and bodily security. *See id.* The present case, which does not involve corporal punishment, is in no way in conflict with the *Tawney* decision.

the rule.[3] In the present case, based on Ratner's own allegations, there is no dispute that he knowingly possessed the knife and knowingly choose to place the knife in his locker rather than turn it over to school officials. *See* Complaint, App. at F4, ¶ 13. Ratner was knowingly and intentionally in violation of the school's weapons policy. As such, the school officials' decision to suspend Ratner was rationally related to legitimate state interests and is not properly the subject of judicial review. There is no conflict between the Fourth and Sixth Circuits' opinions.[4]

2. Contrary to the Petitioners' arguments, Loudoun County School Board Policy § 8-32 is not a "zero tolerance" policy either on its face or as it was applied to Ratner.[5] The Policy allows school officials to consider the

---

[3] Contrary to Petitioners' argument, the *Seal* court's decision did not hinge in any way on whether the student intended to harm anyone with the weapon, but rather whether he was knowingly in possession of the weapon.

[4] As the Sixth Circuit said, "A school board can, of course, disbelieve the student's explanation and conclude that the student knowingly violated school policies. If that occurs, due process would be satisfied as long as the procedures afforded the student were constitutionally adequate and the conclusion was rational." *Seal v. Morgan*, 229 F.3d 567, 579 (6th Cir. 2000). The only conclusion to be reached from the facts as pled by Ratner is that he knowingly violated the policy, and therefore, even under the *Seal* court's analysis, the school officials' actions were rational and constitutional.

[5] The Fourth Circuit acknowledged that Sec. 8-32 is not a "zero tolerance" policy. *See* Opinion, App. at B4, n.2. The Virginia Supreme Court also recognized in *Wood by and Through Wood*, 255 Va. at 92-93, 495 S.E.2d at 259, that "[n]either the school division's policies nor the Federal Gun-Free School Act with which Code § 22.1-277.01(a) complies, divests the School Board of its authority to impose a less severe punishment than expulsion."

facts and circumstances of each case and fashion an appropriate punishment. The Policy states,

> Penalties for Violation. Any student who violates this policy with respect to a Category A weapon shall be expelled from Loudoun County Public Schools (the School Board may, however, determine, based on the facts of the particular case, that special circumstances exist and another disciplinary action or term of expulsion is appropriate). Any student in violation of any other terms of this policy shall be subject to expulsion from Loudoun Couny Public Schools, or to such lesser disciplinary action, including long-term suspension, as may be deemed appropriate.

See Appendix at A1.[6] Furthermore, in the student handbook relied on by the Petitioners, students were warned that "**most violations of the weapons...policy will result in expulsion (permanent removal) from school**" and admonished to "**read the weapons...section[] of this booklet carefully.**" *See* Student Handbook, App. at G4 (emphasis in original). Under the "Weapons" policy section, students were told, "No student shall possess any weapon *for any reason* while under school control or supervision" and, further, that "[a]ny student who violates School Board Policy 8-32 shall be subject to expulsion, or to such lesser disciplinary action, including long-term suspension, as may be deemed appropriate." *Id.* at G6 (emphasis added).

---

[6] School Board Policy § 8-32 is attached as an addendum to this brief at A1. The Petitioners did not attach a copy of the policy to their brief, but rather attached a copy of the student handbook. *See* App. at G1.

In the case of Ratner, based on the allegations in his own complaint, the policy required that students found in possession of a weapon be expelled for a minimum of one year unless special circumstances existed. *See* Sec. 8-32, App. at A1. Accordingly, the school administrators found that special circumstances existed in this case and, using the discretion allowed by the Policy, imposed a lesser punishment of a long-term suspension for the remainder of the term. *See* Complaint, App. At F5, ¶ 18. Ratner disagrees with this punishment, which, in his opinion, was harsh and "certainly some form of intolerance." Petition at 22, n.5. Ratner has petitioned this Court to consider the constitutionality of "zero tolerance" policies when the statutory language, as well as the allegations of his Complaint, do not establish that such a policy was applied by these school officials. As such, the petition should be denied.

3. There is no constitutional violation. The allegations of Petitioners' complaint, when taken as true, failed to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). *See also, e.g., Estate Const. Co. v. Miller & Smith Holding Co., Inc.*, 14 F.3d 213 (4th Cir. 1994); *District 28, United Mine Workers of America, Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083 (4th Cir. 1979).

Primarily, Petitioners argue that the lower courts failed to consider whether the complaint stated a cause of action for a violation of substantive due process under the Fourteenth Amendment. *See* Petition at 9. However, this issue is not properly before this Court because Petitioners did not raise their substantive due process argument until their petition for rehearing to the Fourth Circuit. Petitioners did not argue any violation of substantive due process either before the trial court or in their initial appeal to the Fourth

Circuit. Having failed to timely raise their substantive due process claim, the Petitioners' present argument to this Court is improper. *See, e.g., Carden v. Arkoma Assoc.*, 494 U.S. 185, 197 (1990); *Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989); *FTC v. Grolier Inc.*, 462 U.S. 19, 23 n.6 (1983).

Furthermore, the allegations of Petitioners' complaint failed to state a claim for a violation of substantive due process. This Court has stated that a student does not have a fundamental right to a public education. *See San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-37 (1973); *see also, e.g., Sellers by Sellers v. School Bd. of City of Manassas, Va.*, 141 F.3d 524, 530-31 (4th Cir. 1998); *Kolesnick*, 251 Neb. at 581-82, 558 N.W.2d at 813. Therefore, "the appropriate level of scrutiny is the rational basis test." *See id.* at 582; 558 N.W.2d at 813. "In the context of school discipline, a substantive due process claim will succeed only in the 'rare case' when there is 'no rational relationship between the punishment and the offense.'" *Seal*, 229 F.3d at 575. *See also, e.g., Bundick*, 140 F. Supp. 2d at 740; *Escatel*, 2001 U.S. Dist. LEXIS at **23-25.

There is a rational basis for the policy at issue.[7] School administrators have an interest in the safety of students, as well as maintaining order and discipline in their schools. School officials have a rational interest in seeing

---

[7] Petitioners did not allege that the punishment was not rationally related to a legitimate state interest. *See* Complaint, App. at F10, ¶ 44. Petitioners allege that the suspensions "bore no rational relationship to, and [were] imposed without due consideration of the circumstances surrounding the alleged misconduct, and thus were arbitrary and capricious and imposed in violation of Mr. RATNER's right to due process." *Id.* Moreover, these are merely conclusions of law, which are not binding on this Court. *See Estate Const. Co. v. Miller & Smith Holding Co., Inc.*, 14 F.2d 213, 217-18 (4th Cir. 1994).

accidentally or on purpose. They have a rational interest in not allowing a student to determine for himself when he should or should not comply with the school's rules and when he should or should not turn a weapon, which comes into his possession for any reason, over to school administrators. The school's decision to enact a policy which did not allow students to possess weapons *for any reason* while on school property is rationally related to these legitimate interests. There is no violation of the Substantive Due Process Clause of the Fourteenth Amendment.

4. Petitioners failed to state a claim for a procedural due process violation. Petitioners argue that the lower courts erred by applying the standard of review established by this Court in *Goss v. Lopez*, 419 U.S. 565 (1975), to both Ratner's short-term and long-term suspensions. *See* Petition at 17. Petitioners assert that the appropriate standard for Ratner's long-term suspension should have been the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), not *Goss v. Lopez*, 419 U.S. 565 (1975). *See id.* Petitioners cite a single footnote in a district court opinion in Alabama for this proposition. *See id.* (citing *Craig v. Selma City Sch. Bd.*, 801 F. Supp. 585, 591 (S.D. Ala. 1992)). This argument was not timely raised by Petitioners to the lower courts. *See, e.g., Carden*, 494 U.S. at 197; *Canton*, 489 U.S. at 386 n.5; *FTC* , 462 U.S. at 23 n.6. The Petitioners did not argue to the trial court or the appellate court that any standard other than the *Goss* standard applied to Ratners' suspensions. This argument is, therefore, not properly before this Court.

Furthermore, in *Goss v. Lopez*, 419 U.S. 565 (1975), this Court established a procedural due process framework that lower courts have consistently used to consider the constitutionality of school disciplinary actions. *See, e.g.,*

Bundick, 140 F. Supp. 2d at 740; *James*, 899 F. Supp. at 535-36. *Goss* requires that students must receive some kind of notice of the charges against them and some kind of hearing in which they can tell their version of events. *See Goss*, 419 U.S. at 581. Based on the allegations in his complaint, Ratner's suspensions met the requirements for procedural due process.

"[N]ot every departure from a state agency's stated or customary procedures constitutes a denial of constitutionally guaranteed procedural due process." *Jones v. Bd. of Governors of Univ. of North Carolina*, 704 F.2d 713, 717 (4th Cir. 1983). Indeed, as a general rule, "the source of procedural guarantees is to be found solely in the due process clause rather than in any specific procedures provided by the state." *Id.* Any such procedural deficiencies will rise to the level of a constitutional violation only to the extent that they constitute significant departures from constitutionally based guarantees—here, the right to notice of the charges against Ratner and an opportunity to be heard as to those charges. *See id. See also Hillman v. Elliot*, 436 F. Supp. 812, 817 (W.D. Va. 1977) (holding that defendants who substantially comply with their own disciplinary rules satisfy the due process clause). None of the various allegations of violations of the Virginia Code or school board policy, as alleged in Petitioners' complaint, amounts to a departure so significant or substantial so as to deny Ratner the notice and hearing which he was due under the Fourteenth Amendment.[8]

---

[8] Petitioners state that they "alleged that numerous procedural safeguards imposed by the Virginia Code to govern suspensions were not adhered to, to Petitioners' prejudice." Petition at 5. The complaint does not allege any facts to support Petitioners conclusion here that they were prejudiced by any alleged violation of state procedures. In fact, Petitioners' complaint alleges that the state procedures were inadequate. *See* Complaint, App. at F10, ¶¶ 45-47.

Although Petitioners say that "[c]ertiorari is appropriate to allow the Court an opportunity to clarify for public school administrators, parents and students what process is due students in imposing long-term suspensions," Petition at 17-18, Petitioners do not articulate what constitutional process—under any standard—that Ratner was denied. Based on his own allegations, Ratner received numerous notices of the charges as well as opportunities to tell his version of events. *See* Mem. Op., App. at E5-E6. The school officials chose to mitigate Ratner's punishment by imposing a long-term suspension rather than expulsion. Petitioners continue to disagree with the severity of the punishment imposed, which in their opinion was too harsh, but there is no constitutional violation. The trial court, affirmed by the Fourth Circuit, correctly concluded that "Ratner...received all the process due him." Mem. Op., App. at E6. *See also* App. at B5.

5. Petitioners failed to state a claim for a violation of equal protection. The Petition does not set out with any specificity why the lower courts erred in dismissing this claim. The Petitioners failed to allege that the school officials' actions were based on a discriminatory intent, or any other improper purpose. *See Sylvia Development Corp. v. Calvert County, Md.*, 48 F.3d 810, 819 (4th Cir. 1995). Below, the Petitioners relied on this Court's recent opinion in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), to argue that they were not required to allege an improper purpose to state an equal protection claim. The *Olech* decision does not relieve plaintiffs from the burden of alleging discriminatory intent. *See, e.g., Hilton v. Wheeling*, 209 F.3d 1005 (7th Cir. 2000), *cert. denied* 148 L. Ed. 2d 678 (2001); *Bryan v. The City of Madison, Mississippi*, 213

F.3d 267 (5th Cir. 2000); *Shipp v. McMahon*, 234 F.3d 907 (5th Cir. 2000).

The thrust of Petitioners' argument is that the school officials acted pursuant to, and in accordance with, an adopted and published policy. Ratner, a student, simply does not agree with the punishment he received. It is not improper for school officials to enforce a rule with which a student does not agree, especially in light of the fact that it is undisputed that Ratner was knowingly in violation of the rule against possessing a knife on school property.

6. As this Court has said, "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308, 326 (1975). *See also Bundick*, 140 F. Supp. 2d at 740. Citing numerous newspaper articles, as well as scholarly and legal publications, Petitioners argue that the "issue of 'Zero Tolerance' policies generally, and Petitioners' case specifically, has been the subject of immense commentary in the media and public discussion recently, most of it negative toward such policies." Petition at 18. It is not the role of courts to weigh in on issues merely because they are the subject of public discussion and debate. In this case, there is no constitutional violation. *See Mitchell*, 625 F.2d at 664 ("If the plaintiffs believe the rule mandating expulsion for the bringing of weapons to school is too harsh, their remedy is to persuade the School Board to change it."). Debate and discussion over the wisdom and appropriateness of school disciplinary policies is properly confined to legislatures and school boards, not courtrooms.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari filed by Petitioners Benjamin A. Ratner and Beth Haney should be denied.

Respectfully submitted,

Carol T. Stone
Counsel of Record
John O. Easton
Anna M. Stafford
JORDAN COYNE & SAVITS, L.L.P.
10486 Armstrong Street
Fairfax, Virginia 22030
Telephone (703) 246-0900